No. 637

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

UNITED STATES OF AMERICA,
Petitioner

v.

JOHN B. ATKINS,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

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Cases:

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OPINIONS BELOW

The opinion of the District Court (R. 163-182) is reported at 86 F. Supp. 342. The original opinion of the Court of Appeals (R. 207-211) is reported at 189 F. 2d 414. The first opinion of the Court of Appeals on rehearing (R. 226-227) granting a rehearing, reversing its former judgment and affirming the judgment of the District Court, is reported at 191 F. 2d 146. The second opinion of the Court of Appeals on rehearing (R. 235-238) denying the Government's petition for a rehearing is reported at 191 F. 2d 951.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition for Certiorari.

QUESTION PRESENTED

Whether Atco Investment is a valid partnership under the tests of *Commissioner v. Culbertson*, 337 U. S. 733. This case was tried in the District Court prior to this Court's opinion in the *Culbertson Case*. The opinion of the District Court was handed down after the *Culbertson* decision. The question in the case has always been the validity of the father-son partnership Atco Investment Company. The Internal Revenue Agent in Charge, who by his ruling for the Commissioner of Internal Revenue started this case, imposed the tax liability in controversy by holding the taxpayer "accountable for all of the income of the Atco Investment Company as the sole proprietor thereof." (R. 9). The District Court stated the question:

> "The defendant (petitioner) takes and has taken the position that all of the income from Atco Investment Company for the Year 1943 must be included in the plaintiff's (respondent's) income and may not be divided for the purposes of computing income taxes three-fourths to plaintiff (respondent) and one-fourth to John B. Atkins, Jr. (respondent's son), as is provided for in the Agreement of Partnership of Atco Investment Company." (R. 165)

When this Court's opinion in the *Culbertson Case* completely blocked the petitioner's position it then raised the

question of *Burnet v. Leininger*, 285 U. S. 136, as an afterthought. That case does not and was never intended to apply to a case such as this.

STATUTE INVOLVED

The pertinent provisions of the Internal Revenue Code with the exception of the section set forth below are set forth in the Petition for Certiorari, p. 3.

Internal Revenue Code:

Sec. 3797. Definitions

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof -

(2) *Partnership and partner.* The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term "partner" includes a member in such a syndicate, group, pool, joint venture, or organization. (26 U.S.C. 1946 ed., Sec. 3797.)

STATEMENT

The facts out of which this litigation arises are set forth succinctly in the opinion of the District Court (R. 163-182) which is reported at 86 F. Supp. 342. It is suggested that that opinion be read in full as an accurate statement of the case. The petitioner does not question the facts as dealed by the District Court.

ARGUMENT

I.

The Decision Below is Clearly Correct and not in Conflict with Other Decisions

The District Court, after hearing the witnesses and considering the other evidence, found that the income of Atco Investment Company was not the product of the personal services, efforts or labors of either the father (respondent) or his son, but that "those earnings were the return on capital invested." (R. 179). It found that both the father and his son contributed capital to that partnership that originated with each within the meaning of *Commissioner v. Tower*, 327 U.S. 280. (R. 179) It then subjected the facts of the case to all of the tests of *Commissioner v. Culbertson*, 337 U.S. 733, and concluded that Atco Investment Company met every one of those tests and was a bona fide partnership binding for all purposes including taxation. (R. 179-182) It was that decision that was affirmed by the Fifth Circuit.

The petitioner insists that the decision in this case is not consistent with *Burnet v. Leininger*, 285 U.S. 136, and *Lucas v. Earl*, 281 U.S. 111. (Petition 9-14.) In the latter case, upon which the former is based, Earl entered into a contract with his wife by which he assigned to her one-half of his future law fees and his future salaries. The question for decision was whether or not Earl was to be taxed on his law fees and salaries in their entirety or whether he was to be taxed on one-half and his wife the

other half. This Court held that Earl by his own personal services earned the income and that it was taxable to him despite the fact that he had made an anticipatory assignment of a part of it to his wife. In the *Leininger Case* the husband earned income from his labors in and capital invested in a laundry business. He attempted to make an anticipatory assignment to his wife of one-half of that income, which was in part compensation for his own services. This Court held that the case of *Lucas v. Earl* is analogous.

The all important point that distinguishes this case from *Lucas v. Earl* and *Burnet v. Leininger* is that in this case none of the income with which we are dealing was the result of the personal efforts, labors or services of either the taxpayer or his son. The partnership here involved is an investment partnership just as its name implies. The distinction for tax purposes is that one cannot assign income earned by personal services, labors and efforts. On the other hand, it has always been permissible to convey an asset which itself earns income—and the conveyance of that asset carries with it the income that the asset produces. This is true whether the asset be a stock or an interest in a partnership as long as the grantor's personal efforts, services and labors are not responsible in whole or in part for the income of that partnership.

On the foregoing basis alone this case is distinguishable in principle from both the cases discussed above as well as from the lower court cases cited in the petition, pages 15-16.

II.

There is no Important Question of Federal Law

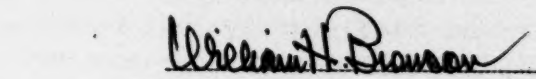
The petition (p. 16-19) suggests that because of the decision in this case there is serious doubt that *Burnet v. Leininger* will be followed. Such a doubt is hardly well-founded in view of the long list of cases cited by the petition in which the case has been followed. Included among those cases is a Fifth Circuit case, *Morton v. Thomas*, 158 F. 2d 574, in which the same Circuit Court as decided this case meticulously folowed *Burnet v. Leininger* as do all other Circuits where the point has been presented. If a Circuit Court held that a lawyer could assign some of his income from his law partnership or any other partner or individual could assign income that resulted from his efforts, labors and services, and thereby escape paying taxes on that income—there would be a basis for the apprehension expressed in the petition. Neither the Fifth Circuit in this case nor any other Circuit has made such a holding. On the other hand, a person can sell or place in a partnership an asset that produces income without his services and efforts and the income produced by the asset after the date of sale or transfer follows the asset. That is what happened in this case. The principle of *Burnet v. Leininger* and *Lucas v. Earl* is not applicable here. This is not an "arrangement by which fruits are attributed to a different tree from that on which they grew." 281 U.S. 111, 115. The taxpayer here involved did not "grow" the income through his personal services. The income grew from the assets. The assets were owned

by Atco Investment Company and the income from those assets is the income of Atco Investment Company, a partnership that the trier of facts has found to be bona fide based on the tests laid down by this Court. None of the three opinions of the Fifth Circuit has assailed the bona fide character of that partnership in any respect.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted



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April, 1952

AFFIDAVIT OF SERVICE

STATE OF LOUISIANA :

PARISH OF CADDO :

BE IT KNOWN That this day before me, the undersigned authority, a Notary Public in and for said parish and state, duly commissioned and sworn, personally came and appeared WILLIAM H. BRONSON, who, after being by me first duly sworn, declared that he has this day served upon the Honorable Philip B. Perlman, Solicitor General of the United States of America, copies of the above and foregoing brief in opposition to the petition for a writ of certiorari by depositing the same in the United States mails, first class, with sufficient postage affixed.

William H. Bronson

William H. Bronson

SWORN TO AND SUBSCRIBED before me this 16 day of April, 1952.

Jessie H. Whyte

Notary Public in and for
Caddo Parish, Louisiana.